

Arlington Conservation Commission
Minutes
May 21, 2015

Mr. Stevens called the meeting to order at 7:30 p.m. in the second floor conference room, of the Town Hall Annex. Present were Nathaniel Stevens, Charles Tirone, David White, Janine White, Mike Nonni, Susan Chapnick, Associate Eileen Coleman and of the Commission. Member Curt Connors, Associate Catherine Garnett, Associate Member were not present. Also present were Brad Barber, Teresa DeBenedictis, Caroline and Andy Tiffany, Dominic Meringolo, Jon Witten, Barbara Huggins, Pam Heidell, Suzanne Spinney, Carol Kowalski, Mark Grinberg, and Laura Rothman.

7:30pm – Commission Business:

DWhite/CTirone motioned to approve the 5/7 **minutes** with edits; motion passed unanimously.

7:35pm – **Discussion** – workshop of 40B

Mr. Witten and Ms. Huggins presented details on how projects under the state comprehensive permit law, known as "40B", are handled at the local level. They had given a presentation to the Zoning Board of Appeals (ZBA) last Tuesday evening.

Contrary to wide-spread perception, the 40B permit process does not automatically exempt such a project from local regulations or bylaws. State laws such as the Wetlands Protection Act (WPA) must also be complied with in full. An applicant will submit a 40B project application to the ZBA, usually along with a list of requested waivers from complying with local bylaws such as zoning or local wetlands regulations. An applicant must support their request for waivers on making their project "uneconomic", meaning they would not earn the percentage profit or income provided by law (either an annual 10% "limited dividend" for rental income as profit, or 15% for projects for sale, each as further defined by the relevant subsidy program) if the local requirement wasn't waived. The economic argument is made to, and judged by the ZBA. However the size of the project is determined by the applicant. Local regulations and bylaws may effectively reduce the size of the project or increase its cost and thus reduce its profit margin.

An applicant can ask the ZBA for a waiver of provisions in the Arlington Wetlands Bylaw and Arlington Wetland Regulations, but that is a decision for the ZBA, only if the applicant can demonstrate that but for the waiver the project would be rendered uneconomic. The applicant faces the obligation of demonstrating to the ZBA why the waiver is necessary. The Conservation Commission should provide guidance to the ZBA on this request. Waivers are only granted by ZBA and the ZBA should only grant them if they determine the waivers are needed to keep the project from being uneconomic or necessary to protect public health.

When a 40B application is filed with the ZBA, the Conservation Commission and other local boards will receive notice. The Conservation Commission and other local boards will have 30 days to provide comment to the ZBA on the project, including why the local environmental protection (wetland) rules the applicant is requesting be waived are important and should be upheld. The ZBA will also decide on health and safety issues, for instance if the groundwater is negatively impacted then, the neighboring houses may experience more flooded basements.

Ms. Chapnick suggested that in comments by the Conservation Commission to the ZBA, the Commission elucidate which requirements are under the state WPA and which are under our local bylaw, and how those requirements differ, so the ZBA can make informed decisions on the developer's waiver request. Mr. Witten suggested that the Conservation Commission also provide a list of questions that the ZBA should ask the 40B Applicant. The applicant of a 40B project will still have to obtain a permit under the WPA, so will have to file a NOI or other application with the Conservation Commission. The Commission will hold its own hearings on the project in response to the WPA application; it will not hold hearings under the Wetlands Bylaw. Those hearings will depend on when the applicant files with the Commission.

The likely sequence of 40B permit review is:

- 1) Upon receiving a "project eligibility" letter from a state agency, the 40B application is filed with the ZBA. The Conservation Commission will have 30 days after the application is filed to provide comments with the ZBA. Members and staff of the Conservation Commission can/should attend the ZBA hearings to prepare detailed comments to the ZBA on the local wetland bylaw and regulations, defining setbacks, buffer zones, and other wetland provisions.
- 2) Once the ZBA process is finished, the 40B applicant files an application with the Conservation Commission in a Notice of Intent that shows the design, and the Commission reviews it under the WPA and, unless waived by the Board of Appeals, the local Wetland Bylaw and Regulations.

It is possible that the developer, before filing a 40B application (step 1) above), applies to the Conservation Commission to get a ruling on the delineation of wetland resource areas. If the developer does that, the WPA and Wetland Bylaw apply.

When the applicant files a Notice of Intent or other application for approval under the WPA, the Conservation Commission can hire a peer review consultant at the applicant's expense, per G.L. c. 44, § 53G. The consultant could be an expert in wetland delineation, wildlife habitat evaluation, endangered species review, stormwater compliance, floodplain compensation, or hydrogeologist, as examples. When the 40B application is filed with the ZBA, the Conservation Commission should assist the ZBA in locating and hiring a peer review consultant on these topics to assist the ZBA (and the Commission in providing its comments). When the application is filed with the ZBA, but not the Conservation Commission, the Commission cannot require the applicant to pay for a peer review consultant.

Mr. Witten noted that the Town of Arlington has a well established Open Space Plan that has been approved by the Planning Board (Redevelopment Board), and that holds sway with the Housing Appeals Committee should the ZBA's decision be appealed by the applicant. The ZBA can also use the Open Space Plan to evaluate efficacy of the development.

Mr. Witten noted that the Town also has a strong local bylaw and Wetland Regulations – the Conservation Commission should focus on assisting ZBA in understanding the importance of our local regulations, especially for stormwater management.

Full stormwater compliance is an important review. Offsite hydrological effects can be considered. Ms. White asked if any cases have argued that climate change will be calculated into the mitigation strategies.

Ms. Huggins said that this topic has not yet been litigated, but it is coming.

The local bylaws and regulations are those that are in effect when the Applicant files the 40B application with the ZBA.

Mr. Witten outlined what the appeals process is for 40B projects. An applicant can appeal a ZBA's denial or approval with conditions to a state board, called the Housing Appeals Committee. He stated that the State would likely side with the developer on an appeal. Therefore, he suggested that the best approach may be for the ZBA to approve a buildable project with conditions.

Abutters who are aggrieved can appeal to Land Court or Superior Court; that appeal is put on hold until the Housing Appeals Committee renders its decision. Further appeals can delay a final decision for some time.

The 40B presentation and discussion concluded at 8:30pm.

8:30 pm **Notice of Intent** – 44 Hopkins Rd, remove driveway, continued from 5/7

Carolyn and Andy Tiffany responded to the Town Engineer's request that the gravel type be specified. They intend to use ¾" washed stone and a granite border. They will use a temporary berm for erosion control.

The following conditions for the permit were discussed:

- 1) The removal of asphalt can only be done on areas under 3% grade.
- 2) All asphalt must be removed from the site everyday. No onsite storage will be allowed.
- 3) Maintenance and repairs are specified in the narrative submitted by the Tiffany's
- 4) The depth of the gravel must be six (6) to eight (8) inches minimum.
- 5) Air spading or another approved method must be used for root protection of the large sugar maple.
- 6) The provision and adherence to an Operation and Maintenance plan shall be a continuing condition.

- 7) This work still needs clearance from the Natural Heritage and Endangered Species program.

DWhite/Chapnick motioned to close the hearing; motion passed unanimously. The Commission will draft an Order of Conditions with the above conditions and approve it at the next meeting.

8:45pm Notice of Intent – Spy Pond aquatic weed control, continued

Mr. Stevens recused himself from the proceeding, and Mr. White served as chair.

Ms. Beckwith sent a draft order of conditions to the Commission. The use of the herbicides and glyphosate in particular was discussed.

The protection of the endangered sedge plant during the spot treated with Reward was discussed. Brad Barber, abutting resident to Spy Pond, told the Commission that the drawdown at his property can be as much as 3 feet wide. Charles Quinlan of Oxbow associates will conduct a fall survey of the sedge plant in the late fall. All work must comply with conditions put forth by NHESP.

Mr. Tirone stated that there was no need to waive the Arlington Regulations as currently written within the draft Spy Pond Aquatic Vegetation Management Order of Conditions. He recommended the Commission approve the project under Section 24 D (4) of the Arlington Wetlands Bylaw Regulations saying the proposed work meets the performance standards in this section.

Ms. Chapnick stated that GEIR is based upon old data. EPA updated registration review information for glyphosate is due in 2015. She recommended that the permit be conditioned to require cut/wipe dab (applicant maintained this method may be too slow – recommended hand wipe) application to phragmites. If this is not practical targeted backpack spray may be used to minimize the drift of the herbicide. If EPA changes use restrictions the new recommendations must be followed.

Other conditions discussed: require 72-h notice of herbicide application; signage about herbicide application; requirement of application on a non-windy day to minimize drift; glyphosate solution concentration specified at 1.5%.

Tirone/J.White motioned to close the hearing; motion passed unanimously. Chapnick/Tirone motioned that the permit be issued with the above stated conditions but the Commission needs to edit the written draft conditions and will sign these at the next meeting; motion passed unanimously. Chapnick and Tirone agreed to draft the Order of Conditions discussed.

Mr. Stevens came back into the meeting.

9pm Wetland Regulations – proposed revisions to Commission's regulation, continued

DWhite/Stevens motioned to continue the discussion to next meeting 6/4 at 8:30 pm.

Commission Business (cont.):

An Eagle project at **Window on the Mystic** will come back the Commission to review his work and get a permit.

DWhite/Stevens motioned to approve the 5/7 **minutes** with edits; motion passed unanimously.

Ms. Beckwith received a report of an **invasive clam in Spy Pond**. The species was confirmed by both Adam Baldinger at Harvard Museums and Jay Cordeiro of UMASS Boston. Mr. Barber reported both Tom Fannery and Steve Asen biologists at DCR confirmed this as well. The Commission proposed that we generate new signs and flyers. Mr. Tirone asked if the Town's sign shop can make signs or do we need to use a vendor. Mr. Tirone will draft these notices. It was suggested that a flyer be prepared on this for the May 30th Spy Pond Fun Day from 1 to 4pm. It could be available at the Mystic River Watershed Association's table.

Meeting adjourned at 9:50 pm.

Respectfully submitted,
Corinna Beckwith
Commission Administrator